

90-690

NO. _____

Supreme Court, U.S.

FILED

SEP 19 1989

JOSEPH F. SPANOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1989

SUSAN K. DENTON CHRISTY,

Petitioner,

v.

JAMES HUGH CHRISTY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIFTH APPELLATE DISTRICT**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a trial court should be required to review all potentially available evidence prior to ruling on the modification of a custody order when such a modification will affect the free exercise of religion?

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Supreme Court of the United States

OCTOBER TERM, 1989

SUSAN K. DENTON CHRISTY,

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v.

JAMES HUGH CHRISTY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FIFTH APPELLATE DISTRICT

Petitioner SUSAN K. DENTON CHRISTY prays that a writ of certiorari issue to review an opinion and judgment of the California Court of Appeal, Fifth Appellate District, affirming an order and judgment of the Superior Court of Kern County, California.

OPINIONS BELOW

The opinion of the California Court of Appeal is unpublished and is set forth at page A2 of the Appendix. The unpublished order of the Superior Court of Kern County, California, is set forth at page A12 of the Appendix.

JURISDICTION

The California Court of Appeal entered its opinion and affirmed the judgment on March 7, 1990. This Petition is filed within ninety (90) days of June 21, 1990 when the California Supreme Court denied a timely petition for hearing. Appendix, p.A1. This Court's jurisdiction is invoked under 28 U.S.C. section 1257.

CONSTITUTIONAL AND STATUTORY**PROVISIONS INVOLVED**

The First Amendment to the United States Constitution provides, in pertinent part:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

California Civil Code section 4600, provides in pertinent part:

"(a) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their

marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy.

"In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper."

California Code of Civil Procedure
section 4608, provides in pertinent part:

"In making a determination of the best interest of the child in any proceeding under this title, the court shall, among any other factors it finds relevant, consider all of the following:

(a) The health, safety, and welfare of the child.. . ."

STATEMENT OF THE CASE

Petitioner SUSAN K. DENTON CHRISTY and respondent JAMES HUGH CHRISTY were married in 1977. Dissolution proceedings were initiated in 1984. The final decree of divorce included the custody award of the couple's two children JACOB, born January 6, 1981 and ADA, born February 21, 1984. Beginning in September 1985, the parents initiated a series of legal proceedings relating to visitation.

On April 25, 1986, respondent filed an order to show cause requesting modification of the visitation order and asking for custody of the two children. Petitioner sought an order to show cause re contempt, alleging that respondent had failed to pay child support along with other complaints. A consolidated hearing was held on October 9, 1986, which ended in a mistrial. The parties agreed to a psychological evaluation to be conducted by Benita Eckhardt, a school psychologist and psychological assistant. The court heard

evidence and argument on the matter on February 20 and March 6, 1987.

Petitioner has very strong and deep religious beliefs. The Christy children were very active in church activities. Pastor Wendell Vinson, pastor of the Canyon Hills Assembly of God, the church which petitioner and her children attended, characterized petitioner's involvement with her children as close, loving, and healthy.

Eckhardt testified in court and opined that the Christy children were not in any danger in the care of their mother.

Their physical needs were being met and there was no danger of any physical injury.

Eckhardt expressed some concern regarding the possible emotional detriment to the children because of the closed, enmeshed lifestyle of petitioner's family. This opinion was based upon the failure of Eckhardt to appreciate and understand a close religious family situation.

In contrast to petitioner's family situation, it was essentially undisputed that respondent was residing with a live-in girlfriend, Paula Snell. In her evaluation, Eckhardt admitted that the Christy children

would suffer confusion regarding religious and moral values. Respondent was found to suffer from a dependent personality disorder, passive-aggressive traits and some borderline traits. Petitioner was very concerned about her children being exposed more than necessary to such an environment.

This concern was well-founded as demonstrated by an incident in which respondent and his live-in girlfriend, Paula Snell, came to petitioner's home for visitation. While respondent was in the house, Snell burst into the house in a rage, waving her arms and screaming obscenities.

In the process of her ranting and raving, Snell hit petitioner's sister, Nancy Bettencourt, on the chin. Respondent was forced to grab Snell's arm and carry her out of the home. Snell also refused to let any of petitioner's relatives speak with Jacob when he was visiting respondent.

The trial court reviewed the evidence set forth above along with other evidence, and on April 30, 1987, made the following ruling:

"The Court normally does not delay ruling on a child custody order as long as the delay here has been. However, the facts

presented leave the Court perplexed concerning the best interests of the children. The dilemma is thus:

"Both from the Court's direct observation of the witnesses as well as the observation and conclusions of Ms. Ekhardt [sic], the Court is convinced that custody by petitioner is harmful to the children. She and her family members with whom she lives are purposely turning them against their father. In addition, the family leads such an ingrown life, the children do not have a chance to develop normally. The Court is not inclined to continue physical custody with petitioner.

"But the Court also is not satisfied that the respondent's home provides a wholesome atmosphere for the children. There is not much evidence, except from the testimony of respondent and his wife, which is patently self-serving, about their living conditions.

"Therefore, the following orders are made:

"1. Physical custody of Jacob shall be with respondent;

"2. Petitioner's visitation shall be on alternate weekends, with one parent to be responsible for transportation for an entire weekend, alternating between them;

"3. Physical custody of Ada shall alternate between parents every two weeks, with Ada to be with Jacob while Jacob is with petitioner;

"4. The holiday schedule shall remain as previously ordered;

"5. Both children shall be with petitioner during July, 1987, and both children with respondent during August, 1987;

"6. The Court requests a Social Services investigation into the living conditions and home environment [sic] of respondent by the County of Alameda.

"For the purposes of referral to Alameda County, this issue

is submitted to the Kern County Probation Department.

"7. Upon receipt of the report from Alameda County, the matter shall be set for further consideration concerning the best interest of the children.

"8. Each party shall bear his/her own fees and costs." Appendix, p. A12-13.

Paragraph 6 of the April 30, 1987, Order specifically constitutes a sua sponte request for a "Social Services investigation into the living conditions and home environment of respondent". This Order was

apparently based on the Court's conclusion as set forth in the third unnumbered paragraph of the order that it was "not satisfied that the respondent's home provides a wholesome atmosphere for the children."

The California Court of Appeal issued its opinion on March 7, 1990. The court concluded in its opinion that there was sufficient evidence to support the Court's conclusion that the "ingrown life" of petitioner's family interfered with the children's ability to develop normally. The Court admitted that the effect of

petitioner's religious values have caused the trial court concern. Appendix, p. A8. Petitioner's free exercise of her religious rights were found to have interfered with petitioner's ability to assist her children in their relationship with their father. Thus, petitioner's religious beliefs were a factor in a decision to modify the custody order which occurred before the further investigation provided in the Court's order was conducted. The Court of Appeal failed to fully and adequately address petitioner's right to free exercise of her religious beliefs.

On June 21, 1990, the Supreme Court of California, without opinion, denied the petition for hearing. Appendix, p. A1.

REASON FOR GRANTING THE WRIT

The federal courts have not directly addressed the issue of the exercise of religious freedom in the context of the awarding or modifying an award of child custody. Several state courts have addressed this issue, however, finding that it is an impermissible infringement a parent's constitutional right to free exercise of religion when his or her

religious beliefs are utilized in conditioning an award of child custody. Ex. Parte Hilley, 105 S.2d 708, remand, 405 S.2d 711 (1981, Ala.) Bonjour v. Bonjour, 592 P.2d 1233 (1979, Alaska), Johnson v. Johnson, 564 P.2d 71, cert. den. 434 U.S. 1048 (1977, Alaska). There is a desperate need for Supreme Guidance on this issue.

The right to freedom of religion under the First Amendment must be jealously protected. When a court considers the religious attributes and/or beliefs of a parent in a manner involving child custody, it should be required to assemble and review

all evidence which may reasonably have an impact on the court's decision.

In the instant case, it was undisputed that the Christy children were not in any physical or serious emotional danger prior to the modification of the custody order. Furthermore, the Court sua sponte requested that additional evidence be produced prior to its rendering a decision. Requiring courts to withhold making decisions which have an impact upon the parent's right to freedom of religion until the court has all of the pertinent facts before it would help to preserve the

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religious rights, one of the paramount freedoms upon which this country is based. Without such guidance, courts like the ones below will continue to infringe upon the religious choices of parents at the expense of both the parent and the child.

Based on the foregoing, the writ of certiorari should be granted as prayed, with an opinion issued by this court setting forth a clear unequivocal rule that unless a child is in potentially serious physical or emotional danger, freedom of religion should not be abridged.

CONCLUSION

For all the reasons stated, Susan K. Denton's Petition for a Writ of Certiorari should be granted. The need for uniformity and guidance in the area of custody awards and the preservation of religious freedom require the review of the decision of the California Court of Appeal.

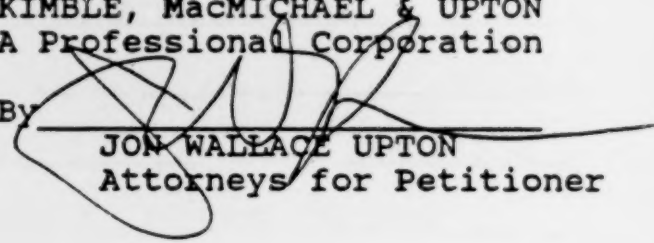
Nothing is more precious than the welfare of
this nation's children.

Dated: September 17, 1990.

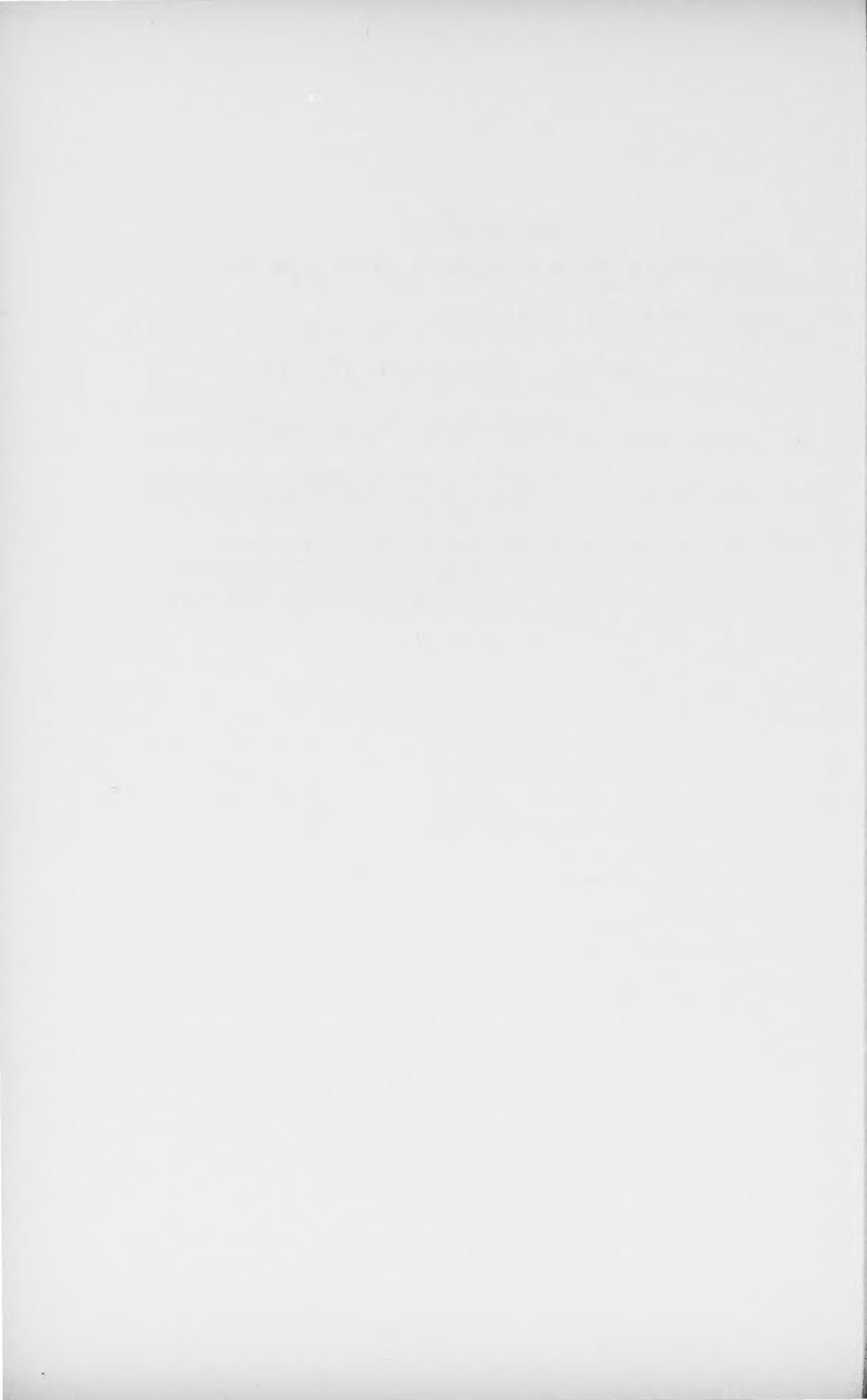
Respectfully submitted,

KIMBLE, MacMICHAEL & UPTON
A Professional Corporation

By



JON WALLACE UPTON
Attorneys for Petitioner



APPENDIX

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94120

June 21, 1989

I have this day filed Order _____

HEARING DENIED

In re: 1 Civ. No. F008938

SUSAN K. DENTON CHRISTY

vs.

JAMES HUGH CHRISTY

Respectfully,

Clerk

575400.24.105.3



NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Matter of SUSAN K.)	
DENTON and JAMES HUGH CHRISTY.)	F008983
-----)	
SUSAN K. DENTON CHRISTY,)	
)	
Appellant,)	(Super.
)	Ct. No.
)	507103)
v.)	
JAMES HUGH CHRISTY,)	
)	
Respondent.)	<u>OPINION</u>
_____)	

APPEAL from a judgment of the Superior Court of Kern County. William A. Stone, Judge.

Kimble, MacMichael & Upton, D. Tyler Tharpe and Renee Sperling for Appellant.

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Gill & Gill and Susan M. Gill for
Respondent.

-ooOoo-

STATEMENT OF THE PROCEEDINGS BELOW

Appellant Susan K. Denton Christy is appealing the May 14, 1987, order of the Kern County Superior Court changing custody of her two minor children and the attendant visitation order. A rather complicated course of events preceded the challenged order.

The parties, Susan Christy and James Christy, were married in 1977. On February 21, 1984, a petition for dissolution of the marriage was filed. Incorporated into the Interlocutory Judgment were the terms of a settlement agreement executed by both parties on February 10, 1984. The final decree of

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divorce followed. The decree awarded custody of the couple's two children (Jacob born Jan. 6, 1981, and Ada born Feb. 21, 1984) to Susan. James was awarded reasonable visitation rights.

In September 1985, difficulties with visitation led to further litigation. Over the next two years both parents sought numerous orders to show cause for modification and for contempt of the various custody orders. The dispute concerned both children but seem to center on Ada. Ada was born after the couple separated. Susan claims James is not the actual father of Ada but that Ada was conceived as a result of a rape which occurred in Hawaii. To further complicate the matter, James underwent a vasectomy before Ada was conceived which he believed

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prevented his fathering Ada. Later he learned the vasectomy had not been successful, and it was possible he was Ada's father. On January 24, 1986, the court found that James was the father of Ada. There is evidence suggesting Susan continues to believe and to suggest to Ada that James is not her father.

On April 25, 1986, James filed an order to show cause requesting modification of the visitation order and asking for custody of the two children on the grounds that Susan was thwarting his visitation rights. On September 19, 1986, Susan sought an order to show cause re contempt claiming James failed to pay child support and other miscellaneous complaints. A consolidated hearing was set for October 9, 1986. The hearing ended in a mistrial. Thereafter,

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the parties agreed to undergo a psychological evaluation to be conducted by Bonita Eckhardt, a school psychologist and psychological assistant. after the evaluation was conducted, a hearing was held to determine the merits of James's modification request. On February 20 and March 6, 1987, the court heard evidence and argument on the matter.

On April 30, 1987, the court awarded sole physical custody of Jacob to James and ordered joint physical custody of Ada, with Ada living with each parent on an alternating two-week basis. The court made the following ruling:

"The Court normally does not delay ruling on a child custody order as long as the delay here has been. However, the facts

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presented leave the Court perplexed concerning the best interests of the children. The dilemma is thus:

"Both from the Court's direct observation of the witnesses as well as the observation and conclusions of Ms. Ekhardt [sic], the Court is convinced that custody by petitioner is harmful to the children. She and her family members with whom she lives are purposely turning them against their father. In addition, the family leads such an ingrown life, the children do not have a chance to develop normally. The Court is not inclined to continue physical custody with petitioner.

"But the Court also is not satisfied that the respondent's home provides a wholesome atmosphere for the children. There is not much evidence, except from the testimony of respondent and his wife, which is patently self-serving, about their living conditions.

"Therefore, the following orders are made:

"1. Physical custody of Jacob shall be with respondent;

"2. Petitioner's visitation shall be on alternate weekends, with one parent to be responsible for transportation for an entire weekend, alternating between them;

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"3. Physical custody of Ada shall alternate between parents every two weeks, with Ada to be with Jacob while Jacob is with petitioner;

"4. The holiday schedule shall remain as previously ordered;

"5. Both children shall be with petitioner during July, 1987, and both children with respondent during August, 1987;

"6. The Court requests a Social Services investigation into the living conditions and home environment [sic] of respondent by the County of Alameda.

"For the purposes of referral to Alameda County, this issue is

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submitted to the Kern County Probation Department.

"7. Upon receipt of the report from the Alameda County, the matter shall be set for further consideration concerning the best interest of the children.

"8. Each party shall bear his/her own fees and costs."

The order after hearing was entered on May 14, 1987. Susan brought a motion for reconsideration and stay pending appeal which was denied. Susan filed her appeal on July 1, 1987.

On July 13, 1987, Susan brought a motion for new trial on the grounds that she suspected Ada was being physically abused by James and/or his live-in girlfriend, Paula. The motion was denied.

After completion of the social worker's report on the living conditions in James's household, a review hearing was conducted on January 26, 1988. After consideration of the report and of all the evidence, the court rendered its final ruling which was not appealed. The court ordered both children placed with the father and provided the mother with visitation on alternate weekends, certain holidays and school vacations, and for the six-week period in the summer of each year.

On January 29, 1988, Susan failed to deliver Ada to James following the end of a two-week custody period established under the May 13 order. Her current whereabouts are unknown.

The appeal currently pending before the court is only from the May 13, 1987, order.

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Subsequent orders rendered in this ongoing custody dispute are not before us.

On December 6, 1989, James filed a motion to dismiss the appeal on the grounds of mootness and unclean hands. The motion was initially granted but later vacated upon petition by Susan's counsel. A ruling on the motion was deferred for consideration with the merits. The motion was denied from the bench at oral argument.

We now consider the merits of the appeal.

DISCUSSION

Susan raises the following issues for our consideration:

(1) Did the trial court abuse its discretion by failing to make a finding that it was in the children's best interests to grant custody to James?

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(2) Is there sufficient evidence to support a finding that there was a change in circumstances sufficient to justify modification of the previous custody orders? (Specifically, Susan claims the trial court abused its discretion in giving substantial weight to the report and testimony of Eckhardt.)

(3) Did the court abuse its discretion by ordering a change of custody before all evidence was before it?

I. MODIFICATION OF CUSTODY ORDER

Susan contends it was an abuse of discretion for the trial court to modify the previous custody orders and/or to change custody of the children from her to James. She claims there is insufficient evidence to support the change or to find the change to be in the children's best

interest. Therefore she contends a change of custody was an abuse of the trial court's discretion. We disagree.

It is well established the frustration of or refusal to allow visitation rights by the custodial parent is a proper ground for modification of the custody arrangement, including the transfer of custody to the noncustodial parent. (Moffat v. Moffat (1980) 27 Cal.3d 645, 652; In re Marriage of Wood (1983) 141 Cal.App.3d 671, 682; In re Marriage of Ciganovich (1976) 61 Cal.App.3d 289.) There is ample evidence in the record to support the court's finding that Susan deliberately attempted to sabotage James's relationship with Ada and his visitation with both children and that, as a result of this conduct, it was

not in the children's best interest to remain with Susan.

Susan continually insinuated that James was not Ada's father, even after there had been a finding of paternity made by the court. Evidence suggests she made these insinuations to Ada and Jacob. Susan's negative feelings towards James and his lifestyle were openly exhibited in front of the children, and this created negative feelings towards James in the children. Susan deliberately thwarted James's visitation rights by refusing to deliver the children to the place where she knew James was residing. She fabricated medical problems to prevent visitation between James and Ada. The resulting alienation between James and the children was harmful to the children's emotional well-being.

The court correctly considered these factors in modifying the custody order. (In Re Marriage of Wood, supra, 141 Cal.App.3d 671, 682.)

There is also sufficient evidence to support the trial court's conclusion that the "ingrown life" of Susan and her family interfered with the children's ability to develop normally. The children had little contact with people who were not connected with Susan's family or church. Susan failed to enroll Jacob in kindergarten, even though he was of school age. Susan's fear of others was reflected in Jacob and Ada. We are not persuaded the trial court's consideration of these circumstances was an impermissible comment on the acceptability of Susan's religious beliefs as she contends. It is true

custody decision are not to be governed by the religious tenets or practices of the parents absent a clear showing that the parents' religious practices would be harmful to the child. (In re Marriage of Murga (1980) 103 Cal.App.3d 498, 504-505.) However, Susan's religious tenets were not the focus of the trial court's order. Rather, it was the effect of the enmeshed family environment and the mother's religious values that caused the trial court concern. Both interfered with Susan's ability or willingness to assist her children in maintaining a loving and fulfilling relationship with their father.

Furthermore, Susan's objections to Eckhardt's report are unfounded. It must be remembered the parties themselves expressly agreed to an evaluation by

Eckhardt. Therefore, any objection to Eckhardt's qualifications as an expert is waived. As the trier of fact, the court was free to assign such weight as he deemed appropriate to the testimony and reports of the two experts. (People v. Hays (1983) 147 Cal.App.3d 534, 543, fn.3.) Ms. Eckhardt spent 37 hours with the family; her conclusions were not unreasonable, and it was not an abuse of discretion for the court to rely on her recommendations and observations in constructing a satisfactory resolution to the custody dispute.¹/ The testimony of Dr. Fisher, although he held a more advanced degree, was based on a two to two and one-half hour interview with

¹The court did state that its conclusions were based on its own observation of the witnesses as well as on the conclusion of Ms. Eckhardt.

Susan and James only. His testimony supported the observations of Ms. Eckhardt concerning Jacob's dependency on his mother and the influence she exercises over him with respect to his relationship with his father and his interaction with the outside world. He confirmed Ms. Eckhardt's conclusion that Jacob suffers from the same paranoia as does Susan. Although Dr. Fisher reached a different conclusion than did Ms. Eckhardt concerning where the children should be placed, the court's rejection of Dr. Fisher's recommendation and its reliance on Ms. Eckhardt's opinion was neither arbitrary nor capricious.

An appellate court generally reverses a domestic relations order only for abuse of discretion. (In re Marriage of Wood, supra, 141 Cal.App.3d 671, 681.) We cannot

say the court abused its discretion in ordering a change in custody under the circumstances of this case.

II. APPROPRIATENESS OF INTERIM CUSTODY ORDER

Susan's final argument is that it was an abuse of discretion for the court to remove the children from her home before a home study was completed on James's home. The report was ordered sua sponte by the court because it deemed additional evidence wise. Before the interim custody order was made, the parties were allowed to present all evidence they deemed relevant. A fair reading of the court's ruling is that further input on how the children would fare with their father was needed, but a finding that it would be detrimental to the children to remain with Susan had already

been made. The initial determination that it was in the best interests of the children to reside with their father until a report on the appropriateness of the father's home was reasonable and supported by the evidence at the time the order was made.

Susan argues the holdings in Nadler v. Superior Court (1967) 255 Cal.App.2d 523, 525, and Schlumpf v. Superior Court (1978) 79 Cal.App.3d 892, 901 make it improper for the trial court to order a change of custody prior to receipt of all conceivable relevant evidence pertaining to the best interests of the children. (Because a home study reporting on the quality of the home to be provided by James was not before the court at the hearing or even prepared at the time of hearing, we must construe

Susan's argument to include any evidence that might be considered relevant to the issue of the children's best interest whether or not it currently existed at the time of hearing.) We do not believe the holdings in Nadler v. Schlumpf go so far nor are they applicable to this case.

The facts of both cases are easily distinguished from those presently before the court. Nadler reversed the trial court's order because it had refused to consider any evidence proffered by the mother concerning her fitness as a custodian parent. The trial court ruled as a matter of law the mother's homosexuality rendered her unfit to be the custodial parent. The appellate court directed the trial court to consider evidence on this

issue as it related to the best interests of the child.

In Schlumpf, the issue involved the appropriate forum for a custody modification hearing. The appellate court held it was an abuse of discretion to rule on the custody issue in California because most of the evidence concerning the children's well-being was more readily available in Wyoming. The facts of this case do not involve a refusal or failure of the trial court to consider existing, readily available evidence.

The type of error found in Nadler and Schlumpf is not present here. The trial court made its order based on the evidence available to it at the time. Its findings are supported by the evidence. It was not an abuse of discretion but an abundance of

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caution which resulted in the interim order and the sua sponte request for the home study. Such diligence is to be commended not criticized.

The judgment is affirmed.

J.

WE CONCUR:

Acting P. J.

J.

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF KERN

Date April 30, 1987 Court Met At 4:00 p.m.

Department No. 8

Present Hon. WILLIAM A. STONE,

JUDGE N. J. SCHMEDDING, NO,

REPORTER No BAILIFF

Title: In re the Marriage of | Counsel:

Petitioner: SUSAN K. | GREG FALK

DENTON CHRISTY | SUSAN GILL

-and- |

Respondent: JAMES HUGH CHRISTY |

NATURE OF PROCEEDINGS: ACTION NO. 507103

R U L I N G

(Re Respondent's Order to
Show Cause for Modification)

The Court normally does not delay ruling on a child custody order as long as the delay here has been. However, the facts presented leave the Court perplexed concerning the best interests of the children. The dilemma is thus:

Both from the Court's direct observation of the witnesses as well as the observation and conclusions of Ms. Eckhardt, the Court is convinced that custody by petitioner is harmful to the children. She and her family members with whom she lives are purposely turning them against their father. In addition, the family leads such an ingrown life, the children do not have a chance to develop normally. The Court is not inclined to continue physical custody with petitioner.

But the Court also is not satisfied that the respondent's home provides a wholesome atmosphere for the children. There is not much evidence, except from the testimony of respondent and his wife, which is patently self-serving, about their living conditions.

Therefore, the following orders are made:

1. Physical custody of Jacob shall be with respondent;

2. Petitioner's visitation shall be on alternate weekends, with one parent to be responsible for transportation for an entire weekend, alternating between them;

3. Physical custody of Ada shall alternate between parents every two weeks, with Ada to be with Jacob while Jacob is with petitioner;

4. The holiday schedule shall remain as previously ordered;

5. Both children shall be with petitioner during July, 1987, and both children with respondent during August, 1987;

6. The Court requests a Social Service investigation into the living conditions and home environment of respondent by the County of Alameda.

April 30, 1987 at 4:00 p.m.

Continued abbreviated title In re the
Marriage of CHRISTY, Susan & James Action
No. 507103

For the purposes of referral to Alameda County, this issue is submitted to the Kern County Probation Department.

7. Upon receipt of the report from Alameda County, the matter shall be set for

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further consideration concerning the best interest of the children.

8. Each party shall bear his/her own fees and costs.

W.A.S.

5/87 Copy of minute order mailed to counsel shown. njs

